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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

DAVID J. MOSCATO, *on behalf of himself and
all others similarly situated.*

Plaintiff,
v.

COMERICA BANK, CONDUENT STATE & LOCAL SOLUTIONS, INC., and CONDUENT BUSINESS SERVICES, LLC,

Defendants

Civil Action No.:
2:23-cv-00993-JAD-MDC

**PLAINTIFF'S MOTION FOR
VOLUNTARY DISMISSAL WITH
PREJUDICE PURSUANT TO FED. R.
CIV. P. 42(a)(2)**

The undersigned, on behalf of Plaintiff David J. Moscato, moves this Court for an Order voluntarily dismissing the above action with prejudice and without attorney's fees, expenses, or costs under Rule 41(a)(2). Fed. R. Civ. P. 41(a)2). The Rule provides for dismissal of an action at the plaintiff's request on terms that the court considers proper. The Rule permits a defendant to object to dismissal if the defendant has pleaded a counterclaim before being served with the motion to dismiss. *Id.* Defendants in this action have pleaded no counterclaim. See ECF No. 44; see also *See Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001) ("A district court should grant a motion for voluntary dismissal under [FRCP] Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result."); *Dr. Tr. Justice "TJ" Truth v. Cal. Cas. Indem. Exch. (THE)*, No. 2:22-cv-01451-GMN-DJA, 2023 U.S. Dist. LEXIS 110370, at *15 (D.

PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL
WITH PREJUDICE PURSUANT TO FED. R. CIV. P.
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1 Nev. June 26, 2023) (“Legal prejudice means prejudice to some legal interest, some legal[]
 2 claim, [or] some legal argument.”) (internal citation omitted).

3 Following initial document discovery, on August 13, 2024, Defendants Comerica Bank,
 4 Conduent State & Local Solutions, Inc., and Conduent Business Services, issued a third-party
 5 subpoena to U.S. Bank, a financial institution where Plaintiff had business bank accounts (as he
 6 had indicated in his discovery responses earlier in this case).
 7

8 On October 11, 2024, Defendants served Plaintiff’s counsel with copies of the U.S. Bank
 9 subpoena responses.¹ Among other things, the responses reflected that on the date of the
 10 disputed electronic funds transfer at issue in this case, a transfer was effectuated by U.S. Bank
 11 between Mr. Moscato’s prepaid Way2Go debit card and his business account. Along with the
 12 third-party subpoena responses, Defendants sent a letter stating their intention to seek sanctions
 13 under Rule 11 against Plaintiff and his counsel “unless Mr. Moscato dismisses his Complaint
 14 with prejudice.”² Mr. Moscato files this request for dismissal within 21 days after his counsel
 15 received Defendants letter. *See Fed. R. Civ. P. 11(c)(2)*.
 16

17 Upon receipt of Defendants’ letter, counsel for Mr. Moscato acknowledged the serious
 18 nature of the allegations and promptly investigated, including reviewing the U.S. Bank supplied
 19 documents with Mr. Moscato. Plaintiff responded to Defendants’ letter on October 30, 2024,
 20 where Plaintiff’s counsel explained the source of Mr. Moscato’s confusion about the transaction
 21 he disputed and agreed to the dismissal of his claims with prejudice and provided Defendants
 22

23
 24
 25 ¹ U.S. Bank’s responses indicated that its production had been served Defendants on September 27, 2024, in whole
 26 or in part.

27 ² Defendants did not serve a proposed motion for sanctions as required by Fed. R. Civ. P. 11(c)(2). That being said,
 the issues raised by Defendants were treated as significant by all of Plaintiff’s counsel.

1 with a Stipulation of Dismissal with Prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii)
 2 (attached as “Exhibit A”).³ In their letter, Plaintiff’s counsel indicated that they would file the
 3 Stipulation of Dismissal once Defendants confirmed their consent to the joint filing. Because
 4 Defendants have filed an answer, their consent is required under Rule 41(a)(1).

5 On October 31, 2024, the following day, Plaintiff’s counsel asked opposing counsel via
 6 email to “confirm that we have Defendants’ consent to include their e-signature in the Stipulation
 7 of Dismissal.” The following morning, November 1, 2024, counsel for Defendants indicated:
 8 “We do not yet have an answer for you on this.”

9
 10 As Defendants have not consented to the Stipulated Dismissal, Plaintiff respectfully
 11 requests that this Court enter an Order dismissing the above action with prejudice and without
 12 attorney’s fees, expenses, or costs under Rule 41(a)(2). A proposed Order of Dismissal is
 13 attached hereto as “Exhibit B.”

14
 15 Dated: November 1, 2024

16 Respectfully submitted,

17
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27
 28 ³ The draft Stipulation of Dismissal provides a signature line for the presiding judge. Although not required by Fed.
 29 R. Civ. P. 41(a)(1)(A)(ii) to effectuate voluntary dismissal, a “so ordered” stipulation is frequently requested by
 30 Defendants in this context.

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PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL
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1 CERTIFICATE OF SERVICE

2 I, Evan S. Rothfarb, hereby certify that on November 1, 2024, I electronically filed the
 3 foregoing with the Clerk of the Court using the CM/ECF system which will send notification to all
 4 registered CM/ECF users:

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